

Our Schizoid Approach to the United States Constitution: Competing Narratives of Constitutional Dynamism and Stasis

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INTRODUCTION: WHY REQUIRE LAW STUDENTS TO TAKE CONSTITUTIONAL LAW?

First, I want to express my deepest gratitude to Dean Lauren Robel for inviting me to deliver the annual Jerome Hall Lecture. Hall was a great member of the Indiana law school's faculty for more than three decades.¹ Although his primary scholarship was in the field of criminal law, he also had a robust interest in comparative law, a topic that is growing ever more important within the legal academy at large and, I should add, in my own work. Moreover, he apparently recognized the necessity as well of interdisciplinary study of the law. Although my remarks below concentrate on American constitutional law, the arguments I make, particularly with regard to the importance of recognizing the importance of basic structures that may be, as a practical matter, impervious to change, are undoubtedly affected by my increasing immersion work done by political scientists on comparative constitutional institutions.

My arguments below are quite simple—though I hope not simplistic. They have two dimensions, one *descriptive*, the other frankly *normative*. Thus, my first descriptive argument is that those who teach American constitutional law, especially within the confines of the legal academy, focus almost exclusively on only one of two competing narratives—which I call the “narrative of change”—that might be told about the United States Constitution. Although I shall presently offer a fuller elaboration of that narrative, it should suffice for now to note that it focuses on the sheer fact that our “constitutional law” changes over time. One can no more gain an accurate understanding of the entirety of the American constitutional enterprise by taking a single time-bound photograph than would be the case with an individual. There may be some important connections between a person at five and at fifty, but it would be foolish indeed to say that there is a strong “identity” between the two time slices unless one resolves some quite complicated problems in the philosophy of identity.² The same, of course, is true with regard to the United States Constitution.

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1. See Indiana University Maurer School of Law — Bloomington, About Jerome Hall, <http://www.law.indiana.edu/students/centers/AboutJeromeHall.shtml>.

2. If, of course, the only thing one is interested in is what some call “DNA identity,” then there are, as far as is currently known, no problems. However, unless one is a police investigator or a doctor, “DNA identity” is rarely likely to be the most important marker of identity. Those

Quite frankly, I cannot imagine that anyone familiar with the American legal academy—I have been a member of that academy for almost thirty years—could possibly disagree with my assertion that “we” are fixated on the “narrative of change.”³ Such presumed agreement will certainly not accompany my second normative argument: our obsession with “the narrative of change” has extremely deleterious consequences with regard to not only what might be termed the “internal” development of scholarship that addresses “constitutional” questions, but also and possibly far more seriously, for what I have come to believe is the most important function that we serve in our role as “teachers” of the American Constitution to our students. That role is, fundamentally, to prepare them for their very likely role as active citizens—indeed, often leaders—within their communities. The importance of this role is often asserted by law schools themselves, but there is little or no self-conscious discussion on the part of law school faculties of what might be involved in taking such a role truly seriously.

Consider that Indiana University Maurer School of Law — Bloomington begins its description of its Doctor of Jurisprudence (J.D.) program with the statement that “[t]oday’s lawyers are expected to provide civic and political leadership and to devote time to the public interest.”⁴ Whether or not one is delighted by the prospect of ever more lawyer-leaders, America is unlikely to lose its propensity, noted by Alexis de Tocqueville nearly 175 years ago, to draw its leaders from those with legal training.⁵ Although one might hope, perhaps naively, that lawyers will receive an education relevant for that possible future role, I doubt that our present way of teaching law students about the United States Constitution is conducive to this goal. We should ask ourselves far more often than I am afraid we do whether training our students for “civic

friends of Dick Cheney, for example, who say that they scarcely recognize the man they once knew, presumably do not believe that he has had a “DNA transplant.” Thus Brent Scowcroft, the former national security adviser to President George H.W. Bush and an opponent of President George W. Bush’s war in Iraq, said, “I consider Cheney a good friend—I’ve known him for thirty years. But Dick Cheney I don’t know anymore.” Jeffrey Goldberg, *Breaking Ranks*, THE NEW YORKER, Oct. 31, 2005, at 54, 57.

3. See, e.g., Morton J. Horowitz, *The Supreme Court, 1992 Term—Foreword: The Constitution of Change: Legal Fundamentalism Without Fundamentalism*, 107 HARV. L. REV. 32 (1993). Inasmuch as I am also a card-carrying political scientist, both by graduate training and membership in the American Political Science Association, I would be surprised if my comment in the text did not also capture the reality of “constitutional law” or “judicial politics” courses taught by political scientists.

4. Indiana University Maurer School of Law — Bloomington, Degrees and Courses, <http://www.law.indiana.edu/degrees/>.

5. See ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 256 (Harvey C. Mansfield & Delba Winthrop eds. & trans., Univ. of Chi. Press 2000) (1835) (“In America there are neither nobles nor men of letters, and the people distrust the rich. Lawyers therefore form the superior political class and the most intellectual portion of society. . . . If one asked me where I place the American aristocracy, I would respond without hesitation that it is not among the rich, who have no common bond that brings them together. The American aristocracy is at the attorneys’ bar and on the judges’ bench.”). I do not want to be understood as agreeing with de Tocqueville in all respects. One might certainly believe, for example, that “the rich” do share a “common bond,” as exemplified by efforts to prevent redistributive taxation and the expansion of the modern welfare state, a reality unknown to de Tocqueville. That being said, it remains true that it does not hurt to be a lawyer if one wants a career in politics.

and political leadership”⁶ might require different emphases, and perhaps even quite different syllabi and casebooks, from those focusing simply on preparing our students best to fulfill their future professional identity as practicing lawyers who should be able to handle competently any constitutional cases that arise in the course of their legal practice. As someone who has not only taught constitutional law for many years but who has also co-edited a casebook,⁷ I can only emphasize that my critique of my colleagues applies almost as strongly to me personally.

I note that Indiana University, like most law schools across the country, requires that students take a course in constitutional law.⁸ But why is that the case, especially given the general diminution in required courses since World War II? I have noted elsewhere⁹ that law schools across the country, including Indiana, certainly do not require all sorts of courses—think only of family law, bankruptcy, or real estate law—that are far more likely to arise in the practice of most law school graduates than are constitutional law cases. Yale, notoriously, does not even require property,¹⁰ even though the graduates of that school are reasonably likely to find themselves involved in complex real estate transactions where knowledge of basic property law might prove useful. Yet Yale does require all of its students to take constitutional law; indeed, Yale is quite exceptional in placing that course in the very first semester of the first year,¹¹ signifying, perhaps, the special importance of the course.

Moreover, if we look at the kinds of constitutional law cases that *are* likely to arise in a statistically typical lawyer’s practice, they receive relatively little attention in the standard course on the subject. Thus, should a “typical” lawyer ever have a constitutional law case, it is likely to involve constitutional criminal procedure or, on the civil side, the Dormant Commerce Clause or long-arm jurisdiction. It would be quite exceptional if any given lawyer has an opportunity to litigate a case involving one of the topics that is the focus of attention at most law schools, such as the reach of congressional power under the Commerce Clause or the nature of the restrictions placed on state or federal power by the First or Fourteenth Amendments. Yet constitutional criminal procedure is no longer part of the standard “constitutional law” course in most schools; instead, it has been confined to an elective course of its own, freely ignored by the vast multitude of students. This is especially true at so-called “elite law schools,” where students do not envision themselves, probably accurately, practicing criminal law either as a prosecutor or a defense attorney. And the Dormant Commerce Clause, I strongly suspect, is threatening to join “state taxation of interstate commerce,” frequently taught around sixty years ago, as a topic that is basically

6. Indiana University Maurer School of Law — Bloomington, Degrees and Courses, *supra* note 4.

7. See PAUL BREST, SANFORD LEVINSON, JACK M. BALKIN, AKHIL R. AMAR & REVA B. SIEGEL, PROCESSES OF CONSTITUTIONAL DECISIONMAKING: CASES & MATERIALS (5th ed. 2006).

8. Indiana University Maurer School of Law — Bloomington, Degree Requirements: Doctor of Jurisprudence (JD), <http://www.law.indiana.edu/degrees/jd/requirements/index.shtml>.

9. See Sanford Levinson, *Reflections on the Role of Constitutional Law in the Law School Curriculum*, 1 AM. JUST. L. REV. 101 (2008) (manuscript originally published online and no longer available; on file with the Indiana Law Journal).

10. See Yale Law School, About the First Term, <http://www.law.yale.edu/academics/jdfirstterm.asp>.

11. See *id.*

ignored. So, whatever justifies requiring the instruction of constitutional law to our students, it is implausible to view that justification as having much, if anything, to do with preparing them for their eventual actual practices.

Nor can a defense of requiring constitutional law emphasize its presence on the bar examination. There are many courses (including corporations and evidence) that are equally present on the bar exam that law schools have long since stopped requiring. Indeed, I cannot help noting that only one of the nine subjects on which applicants for the Indiana Bar must be prepared to write essays—“personal property”—is the subject of a “required” course.¹² Students are apparently expected to pick up relevant knowledge of Indiana constitutional law or of taxation on their own. Similarly, my home institution, the University of Texas Law School, does not require that its students take Texas Civil Procedure,¹³ even though it not only is a required subject of the Texas bar,¹⁴ but also has proved to be the bane of some very able Texas Law School graduates when taking the Texas bar exam.

So, if it is not narrow “professional” concerns or training for the bar exam that justifies the privileged position of constitutional law in the curriculum of most law schools, then what does? Perhaps the correct answer is nothing, so that law schools across the nation should emulate the University of Chicago and Harvard Law Schools, which do not require their students to take constitutional law in order to receive a degree.¹⁵ One can be confident that most students do in fact choose to take courses with such luminaries as Laurence Tribe or David Strauss, but, especially as one might expect at Chicago, enrollment is a function of the market of student interest rather than of compulsion imposed by the institution itself. But the majority of schools that continue to require constitutional law must obviously come up with a cogent justification, and I have already suggested what it is, which is training students to play their potential roles as leaders within their communities, whether defined locally or, in the case of some alumni, on a statewide or even national basis. Consider examples like Indiana Senator Evan Bayh, a graduate of the University of Virginia’s law school¹⁶ and, of course, President Barack Obama of the Harvard Law School¹⁷ (who additionally taught constitutional law, as we are frequently reminded, at the University

12. See Indiana Board of Law Examiners, The Bar Exam: Bar Exam Information, <http://www.in.gov/judiciary/ble/exam/taking.html>.

13. See University of Texas School of Law, Required Courses, <http://www.utexas.edu/law/depts/sao/academics/requiredcourses.html>.

14. Texas Board of Law Examiners, Texas Bar Examination Subjects, <http://www.ble.state.tx.us/Rules/NewRules/appendixA.htm>.

15. See University of Chicago Law School, Degree Requirements, http://www.law.uchicago.edu/academics/degree_requirements.html (noting that “all courses [except for professional responsibility] are elective after the first year,” which does not include any course on constitutional law); Harvard Law School, Handbook of Academic Policies 2008–09, <http://www.law.harvard.edu/academics/registrar/hap/IRrequirementsfortheJDDegree.php> (requiring civil procedure, contracts, criminal law, torts, property, “international or comparative law,” and “legislation and regulation” during the first year and only professional responsibility thereafter).

16. Senator Evan Bayh, Biography, <http://bayh.senate.gov/about/biography/>.

17. The White House, President Barack Obama, http://www.whitehouse.gov/administration/president_obama/.

of Chicago Law School).¹⁸ So what were such distinguished lawyer-leaders likely to have learned and, more to the point, did their respective law schools necessarily define as what is most important to learn about the United States Constitution?

I prefer to try to answer this question by placing it within the framework of my “two narratives,” and to suggest that both they and ultimately “We the People” were disserved by the single overarching narrative that structures the courses that almost all of us, whatever our ostensible differences, teach and that our students must take. I have no desire at all to *replace* one master narrative with another; rather, I strongly believe that the dominant “narrative of change” must be importantly joined by a very different story, what I call “the narrative of stasis.” This second narrative is today strikingly absent from our syllabi and, more to the point, from the self-consciousness of the students (and, ultimately, the leaders) whose views about the Constitution we help to form.

I. THE “NARRATIVE OF CHANGE”

It is, of course, time to become more specific. What *is* this “narrative of change” whose dominance I deplore? It is the emphasis on the degree to which what we call “constitutional law” has a *history*, which almost by definition means that it is a story of “development,” “adaptation,” or, for some, “decline.”¹⁹ Whether one teaches within a law school, a history department, or a department of political science, the dominant story line is almost certain to be the significant changes over time in what political scientists have come to call “American constitutional development” as part of a broader subfield called “American political development.”²⁰ The present is *not* like the past, nor, presumably, will the future mirror the present, and it is the task of the analyst to explain why this has been the case (and will be true in the future).

Before proceeding further, let me point to a paradox of American political culture. Within general American culture, there is a stance toward the Constitution that one can call “veneration.”²¹ One can find instantiations of such an attitude in the treatment of the Constitution as a truly sacred text at the National Archives in Washington; one could just as easily point to the new National Constitution Center dedicated in Philadelphia in 2003. It may be that there is another country in the world that similarly sacralizes its constitution, but I am unfamiliar with it.

Some of this veneration is undoubtedly because of the link of the original Constitution with such giants as Washington, Madison, and Hamilton, not to imagine a host of lesser lights who are significant and, by-and-large, admirable figures. One wonders, incidentally, if the recent turn toward “originalism” would be so strong—I put questions about intellectual coherence to one side—were it not for such linkages. Still, whatever these links and whatever the rise of “originalism,” at least within certain

18. *Id.*

19. This is certainly a major theme of Professor Horwitz’s article. See Horwitz, *supra* note 3, at 39–40.

20. See THE SUPREME COURT & AMERICAN POLITICAL DEVELOPMENT (Ronald Kahn & Ken I. Kersch eds., 2006); Paul Frymer, *Law and American Political Development*, 33 L. & SOC. INQUIRY 779 (2008) (reviewing THE SUPREME COURT & AMERICAN POLITICAL DEVELOPMENT (Ronald Kahn & Ken I. Kersch eds., 2006)).

21. See SANFORD LEVINSON, CONSTITUTIONAL FAITH 3–8 (1988).

academic circles and members of the Supreme Court, one should realize that the principal narrative of the Constitution, especially as taught in American law schools, emphasizes not constitutional fixity but, rather, constitutional *change* and *dynamism*. It is really quite irrelevant whether one accepts or rejects, as a normative matter, notions of “living constitutionalism.” Instead, one cannot in the least understand the basic subject matter of “American constitutional law” without being aware of its many changes over the past 220 years since the ratification of the document.²² The point is most obvious with regard to the (relatively few) formal amendments to the Constitution. But one does not need amendments in order to recognize the importance of what I want to label the narrative of constitutional dynamism.

Think only of one of the most banal features of almost any introductory course in constitutional law, the interpretation of the Commerce Clause. One almost inevitably teaches, and students learn, that over time the Supreme Court has interpreted the Clause in quite different—sometimes spectacularly contradictory—ways. Anyone who proclaimed the uniformity of Commerce Clause doctrine over the years—whether measured in spans of centuries or even decades—would be properly dismissed as foolish, if for no other reason than that some notable decisions explicitly overrule earlier predecessors, often using quite harsh language with regard to the *bona fides* of their now shelved, no-longer-operative precedents, and thus underscore the incompatibility of the interpretive schemas.²³ Similar tales could be told, of course, about almost literally any subject-matter area that is part of the standard-form syllabus of constitutional law courses or the subject matters of casebooks in constitutional law. It really does not matter whether the topic is the Commerce Clause (including its “dormant” version); the Equal Protection Clause; the First Amendment, whether we focus on “free speech,” “freedom of the press,” “establishment of religion,” or the “Free Exercise Clause”; the enforcement of “unenumerated rights”; or the legitimacy of conditions placed by the government on the receipt of funds, to take only some of the most obvious examples likely to be part of the typical syllabus. The one and only constant in all of these areas is a history of changed interpretations. *Plessy v. Ferguson*²⁴ gives way to *Brown v. Board of Education*²⁵; *Lochner v. New York*²⁶ to *West Coast Hotel v. Parrish*²⁷; *Stenberg v. Carhart*²⁸ to *Gonzales v. Carhart*.²⁹ Sometimes cases are formally overruled; other times, the Court offers purported “distinctions” to justify what most analysts would regard as new directions in legal doctrine. One need not descend to believing, with Aristophanes, that “whirl is king”³⁰

22. See, e.g., STEPHEN M. GRIFFIN, *AMERICAN CONSTITUTIONALISM: FROM THEORY TO POLITICS* (1996).

23. See, e.g., *Nat'l League of Cities v. Usery*, 426 U.S. 833 (1976), *overruled by Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985); *Hammer v. Dagenhart*, 247 U.S. 252 (1918), *overruled by United States v. Darby Lumber Co.*, 312 U.S. 100 (1941).

24. 163 U.S. 563 (1896).

25. 347 U.S. 483 (1954).

26. 198 U.S. 45 (1905).

27. 300 U.S. 379 (1937).

28. 530 U.S. 914 (2000).

29. 127 S. Ct. 1610 (2007).

30. See George F. Will, *Whirl is King All Around Us*, *NEWSWEEK*, June 10, 2002, at 64, 64.

in order to believe that one legal history involves constant, perhaps even relentless, change.

Some of us like (some of the) change; others bewail it, particularly if their notion of the Constitution includes a strong notion of fixity. As Professor Horwitz notes, “[t]he idea of a Constitution as fundamental law is one of America’s most important contributions to civilization,” and one part of the conception of “fundamentality,” for many analysts, is “the notion that fundamental law is timeless and unchanging, a view that cannot be reconciled either with twentieth-century constitutional practice or with modern theories of law, language and consciousness.”³¹ But, of course, no one can possibly teach a descriptive course in American constitutional law that treats the enterprise as “timeless and unchanging,” even if this reality creates severe discomfort in the minds of many law students who have heard too many speeches proclaiming our good fortune, as Americans, in being governed by the unchanging concepts set down by the “demigods”³² in Philadelphia over two centuries ago. One of the favorite tropes of some narratives of change is precisely to argue that the changes that have occurred were necessary in order to instantiate the immanent values that can be found within the original Constitution itself. What this boils down to is a notion that all change is only on the surface since the solid core of the Constitution remains untouched by the surface events. This trope would undoubtedly be more successful if the relevant communities of analysts agreed on what constitutes the solid core and that all of the changes are merely the flowerings of the buds contained within that core (or perhaps, if one is an optimist, one should speak of beautiful butterflies emerging from the nondescript caterpillars of the original Constitution).³³ But another presumably noncontroversial piece of description is that there exists no such unified community, that academic lawyers, like the rest of society, can be placed into their own version of “red states” and “blue states” with regard to many basic constitutional controversies that reach the judiciary.³⁴

This reality is illustrated in the relatively common experience of many students of hearing their professors offer stinging critiques, if not outright rants, regarding one or another judicial repudiation of the “correct” view of the Constitution. Few teachers

31. Horwitz, *supra* note 3, at 34 (citations omitted); see also ROBERT McCLOSKEY, *THE AMERICAN SUPREME COURT* 6–8 (Sanford Levinson ed., 4th ed. 2004) (elaborating on the tension between “fundamental law” and “popular sovereignty”).

32. Thus Jefferson wrote to John Adams, after expressing his sorrow that those meeting in Philadelphia decided to keep their deliberations secret, “I have no doubt that all their other measures will be good and wise. It is really an assembly of demigods.” Letter from Thomas Jefferson to John Adams (Aug. 30, 1787), in *THE POLITICAL WRITINGS OF THOMAS JEFFERSON* 136 (Edward Dumbauld ed., 1955).

33. As Jack Balkin has suggested in private correspondence, this is a common theme of what he terms the Progressive Narrative, which sees all change as in effect the realization of what the Constitution, properly understood, always meant from the very beginning. See E-mail from Professor Jack Balkin, Knight Professor of Constitutional Law, Yale Law Sch., to author (Dec. 20, 2008) (on file with the author).

34. Perhaps the best evidence is Professor Laurence Tribe’s decision to suspend the revision of his monumental treatise on American constitutional law, for the reasons given in two letters, the first to his former Harvard colleague, Justice Stephen Breyer, and a longer letter to readers in general. See Laurence H. Tribe, *The Treatise Power*, 8 GREEN BAG 291 (2005), available at <http://www.greenbag.org/Tribe.pdf>.

might object to *any* change having occurred since some presumptively (and highly tendentious) view of a pristine beginning shortly after 1788. More likely, however, is a more selective objection to *certain* changes even as others are celebrated and far more accepted without any great emotion as simply the way of our constitutional world. I am certainly not above such selective evaluation. I have almost no patience for some of the recent Supreme Court decisions asserting the inability of Congress to regulate states under Section Five of the Fourteenth Amendment,³⁵ and I often ask colleagues more sympathetic to those decisions to come into my classes to present their views to my students. And I know that I have colleagues who traduce decisions that I greatly admire. For my purposes, though, how professors *evaluate* the cases they teach is far less important than the brute fact that they necessarily inform the students of the importance of the changes themselves in our constitutional order, even if in addition they also wish students to share their dismay or endorsement.

It is also worth mentioning that, especially within the legal academy, the narrative of change leads to an almost certain overemphasis on the importance of the Supreme Court as an agent of these changes,³⁶ our students are rarely taught the constitutional theories of equally important presidents, members of Congress,³⁷ or mass social movements. It is not simply that those theories are often of great intellectual interest. They also illustrate the fact that in many fields, particularly those the Court has tended to treat as “nonjusticiable” or in which it otherwise exhibits great deference to congressional or executive judgment, the “Constitution outside the courts” is far more important than the shards of constitutional commentary delivered by members of the judiciary.³⁸

35. See e.g., *Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001); *United States v. Morrison*, 529 U.S. 598 (2000); *City of Boerne v. Flores*, 521 U.S. 507 (1997).

36. For a canonical critique of the ability of the Supreme Court to bring about major changes in the teeth of social and political opposition, see GERALD ROSENBERG, *THE HOLLOW HOPE* (2d ed. 2008). Mark A. Graber demonstrates that much of such judicial “activism” occurs at the behest of, rather than against the will of, political officials. See Mark A. Graber, *The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary*, 7 *STUD. AM. POL. DEV.* 35 (1993).

37. But see DAVID P. CURRIE, *THE CONSTITUTION IN CONGRESS: DEMOCRATS AND WHIGS: 1829–1861* (2005); DAVID P. CURRIE, *THE CONSTITUTION IN CONGRESS: DESCENT INTO THE MAELSTROM: 1829–1861* (2005); DAVID P. CURRIE, *THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD: 1789–1801* (1997); DAVID P. CURRIE, *THE CONSTITUTION IN CONGRESS: THE JEFFERSONIANS: 1801–1829* (2001).

38. Certainly the best example of this in recent years is the importance of Office of Legal Counsel memoranda concerning the scope of Article II powers of the President to ignore existing federal statutes and international law with regard to methods of interrogation of alleged “illegal combatants” captured during the so-called “global war on terror.” See, e.g., MARK DANNER, *TORTURE AND TRUTH: AMERICA, ABU GHRAIB, AND THE WAR ON TERROR* app. 1 (2004) (reprinting memorandum from the Office of Legal Counsel); *THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB* (Karen J. Greenberg & Joshua L. Dratel eds., 2005). This general topic should be of special interest to students at Indiana University inasmuch as President Obama, who was elected after my early October 2008 lecture, has named Dawn Johnsen, who was teaching at Indiana University Maurer School of Law — Bloomington, to become the Assistant Attorney General of the United States in charge of the Office of Legal Counsel. This position, I believe, is considerably more important than any given judgeship in the federal judiciary, save, but only

Directly linked with the Supreme Court-centeredness is a tendency to highlight certain Justices as heroes or villains of the historical drama. Given differences among professors, the identity of these specific Justices will be a function of professors' normative evaluations of the cases in question. It is extraordinarily unlikely, for example, that Chief Justice Warren and Antonin Scalia will be equally applauded as normative models of judging, not to mention Roger B. Taney or the first John Marshall Harlan.

Those who go beyond the Court in seeking explanations for change may still exhibit strong disagreement. Those of us who agree substantially with Bruce Ackerman,³⁹ for example, will offer what might be called a "punctuated equilibrium" view of the Constitution, in which certain dramatic changes are the result of basic transformations in the political order, often triggered by social, economic, or military crises. Ackerman breaks sharply with the conventional post-New Deal narrative that castigated the pre-Roosevelt Court for refusing to "follow" the doctrines laid down by John Marshall in *Gibbons v. Ogden*⁴⁰ and substituting instead its own presumptively mistaken notions of the limits placed by the Commerce Clause on the exercise of national power. This narrative is a comforting story of "restoration" of the original Marshallian vision and, therefore, not a real sea change in American constitutionalism. Ackerman, on the other hand, accepts fully the description of many New Deal critics that the Constitution *was* fundamentally changed by the New Deal; instead of lamenting this, however, Ackerman celebrates the initiative of those who in effect amended the Constitution outside of the procedures set out in Article V of the Constitution. Instead, Ackerman emphasizes the constancy of a truly "living" and developing Constitution and rues our failure fully to understand the implications of this fact.⁴¹ Among other things, it blinds us to the importance of mass movements with their own understandings of constitutional possibilities that may well go well beyond those adopted by judges and other "official" interpreters of the Constitution.

Even less "Ackermanian" professors are still likely to recognize links between elections and judicial doctrine. One does not have to believe that the given Justices on the Supreme Court follow the election returns. But no serious person rejects the proposition that appointments to the Court itself are a function of winning elections and that presidents have always been attentive to the likely commitments of their appointees with regard to the subjects of greatest salience to the presidential agendas.⁴²

perhaps, for the Supreme Court itself.

39. See, e.g., 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* (1991); BRUCE ACKERMAN, 2 *WE THE PEOPLE: TRANSFORMATIONS* (1998). A short version of his overall thesis can be found in Bruce Ackerman, *Higher Lawmaking*, in *RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT* 63 (Sanford Levinson ed., 1995).

40. 22 U.S. (9 Wheat.) 1 (1824).

41. See Bruce Ackerman, *2006 Oliver Wendell Holmes Lectures: The Living Constitution*, 120 HARV. L. REV. 1737, 1749–51 (2007).

42. The classic scholarly account is SHELDON GOLDMAN, *PICKING FEDERAL JUDGES: LOWER COURT SELECTION FROM ROOSEVELT THROUGH REAGAN* (1997); see also DAVID YALOF, *THE PURSUIT OF JUSTICES: PRESIDENTIAL POLITICS AND THE SELECTION OF SUPREME COURT NOMINEES* (1999). A very fine recent account of the interplay between the Court and political developments in the wider order is KEITH WHITTINGTON, *POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY: THE PRESIDENCY, THE SUPREME COURT, AND CONSTITUTIONAL LEADERSHIP IN U.S. HISTORY* (2007).

From my perspective, it is beside the point that many of the authors of articles and books examining American constitutional development wear their politics on their sleeves and construct narratives featuring heroic individuals or social movements who confront their benighted and sometimes even evil antagonists. These disputes, endemic within the legal academy, may provide entertainment and even edification to our students, but the very intensity of the arguments reveals the *consensus* that I am most interested in. All of us—liberal and conservative, originalists and “living constitutionalists”—fully agree on the empirical reality of change. That agreement is far more important than the chasms that appear to separate the originalist devotee of Justice Thomas from the admirer of his predecessor Thurgood Marshall, or the proud devotee of a “dead” Constitution like Antonin Scalia from the equally devoted adherent of a “living Constitution” like William J. Brennan.

All of these worthies, and their academic admirers and detractors, nonetheless agree on the ubiquity of change. They simply respond differently to the particular instances of that change. Randy Barnett, for example, may savage the Court for failing to adhere to the distinction, made by many writers at the end of the eighteenth century, between “commerce” and “manufacture” and call for “restoring the lost constitution.”⁴³ He no doubt admires the pre-New Deal Justices who adhered to the distinction and probably agrees with the editors of a recent book, *The Dirty Dozen*, who denounce a plethora of Supreme Court decisions stretching back more than half a century.⁴⁴ The editors call for a repudiation of vast aspects of contemporary constitutional doctrine. The fact that I substantially disagree with Barnett’s and *The Dirty Dozen*’s contributors’ normative visions of the Constitution is far less important than our very strong agreement on the reality of change. Paradoxically or not, acceptance of the views of “originalists,” who object to many of the changes that have occurred, would itself require massive changes in our constitutional doctrines as many cases would be ruthlessly overruled. To put it mildly, there is nothing “Burkean”⁴⁵ about the wing of conservatism that rallies around “restoration” of a purportedly lost, but recapturable, political order. Just imagine what students would have to learn about constitutional change if the contemporary Court were to conclude that former Attorney General Edwin Meese was correct that the “incorporation” of the Bill of Rights against the states was a constitutional error⁴⁶ perhaps akin to the earlier creation of federal common commercial law in *Swift v. Tyson*⁴⁷ and called for the kind of summary overruling that *Swift* received in the landmark *Erie* case.⁴⁸

43. See RANDY BARNETT, RESTORING THE LOST CONSTITUTION 351 (2005).

44. ROBERT A. LEVY & WILLIAM MELLOR, THE DIRTY DOZEN: HOW TWELVE SUPREME COURT CASES RADICALLY EXPANDED GOVERNMENT AND ERODED FREEDOM (2008).

45. See generally Jonathan Rauch, *Mr. Conservative*, ATLANTIC MONTHLY, May 2008, at 15, 15 (naming Edmund Burke “the father of modern conservatism” and describing Burkean views).

46. See, e.g., Edwin Meese III, Address before the D.C. Chapter of the Federalist Society Lawyers Division, in INTERPRETING LAW AND LITERATURE: A HERMENEUTIC READER 25 (Sanford Levinson & Steven Mailloux eds., 1988); see also Robert Post & Reva Siegel, *Originalism as a Political Practice: The Right’s Living Constitution*, 75 FORDHAM L. REV. 545, 550–54 (2006) (discussing Meese and “originalism”).

47. 41 U.S. (16 Pet.) 1, 19 (1842).

48. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938). For a comprehensive discussion of how

The recently concluded contest between Senators Obama and McCain included as one of its subtexts the degree of support or opposition to the various changes in constitutional meaning and the further changes that would attend the appointment of new members of the federal judiciary. Quite obviously, the partisans of each of these candidates had very different responses to the outcome on November 4, 2008, but all could agree that the decision of the voters will be reflected, to one degree or another, in future decisions of the courts staffed by the winner's picks.⁴⁹

II. COUNTERBALANCING THE "NARRATIVE OF CHANGE" WITH THE "NARRATIVE OF STASIS"

The problem is not that students are taught "the narrative of change," knowledge of which is essential for any lawyer or ordinary citizen, but rather, that it is, by and large, the *only* narrative they are taught. It is vitally important to complement that narrative, whether one praises it for its "dynamism" or denounces it as a "regression" or "decline" from some past authoritative template, with a very different narrative that I label "the narrative of stasis." Instead of dynamism or decline, this narrative instead emphasizes the necessity, for anyone who would fully understand the role the Constitution plays in American politics, of grasping the importance of the *unchanging, non-dynamic* Constitution. I have come to the conclusion over the years that the most important parts of the Constitution are the ones that we never teach, and we do not teach them precisely because they are never litigated and therefore never meet the curious criterion of "importance" that underlies the teaching of constitutional law.

Every legal academic should ponder at length the lessons taught by Fred Schauer in his 2006 *Harvard Law Review* article,⁵⁰ which demonstrates conclusively the remarkable level of disconnection between the issues deemed "important" by most Americans and those addressed particularly by the United States Supreme Court. Ordinary Americans are concerned about a range of issues that rarely, if ever, are addressed by the judiciary; conversely, the issues that *are* addressed, however interesting and important—perhaps even matters of literal life and death—to the particular litigants, are rarely of vital concern to most Americans. Consider the implications of the fact that at least six law reviews—Harvard,⁵¹ U.C.L.A.,⁵² Hastings,⁵³ Syracuse,⁵⁴ Ohio State,⁵⁵ and Lewis and Clark⁵⁶—have published or are

Erie relates to the changes that affected the wider intellectual and political worlds of the twentieth century, see EDWARD PURCELL, *BRANDEIS AND THE PROGRESSIVE CONSTITUTION: ERIE, THE JUDICIAL POWER, AND THE POLITICS OF THE FEDERAL COURTS IN TWENTIETH-CENTURY AMERICA* (2000).

49. See, e.g., R. Jeffrey Smith, *The Politics of the Federal Bench; GOP-Appointed Majorities Winning Ideological Battles at Appellate Level*, WASH. POST, Dec. 8, 2008, at A1.

50. Frederick Schauer, *The Supreme Court, 2005 Term—Foreword: The Court's Agenda—And the Nation's*, 120 HARV. L. REV. 4 (2006).

51. See *The Supreme Court, 2007 Term—Comments*, 122 HARV. L. REV. 139 (2008).

52. See Symposium, *The Second Amendment and the Right to Bear Arms After D.C. v. Heller*, 56 UCLA L. REV. (forthcoming May 2009).

53. See Symposium, *The Second Amendment After Heller*, 60 HASTINGS L.J. (forthcoming 2009).

54. See Symposium, *District of Columbia v. Heller*, 59 SYRACUSE L. REV. 165 (2008).

55. See Colloquium, *District of Columbia v. Heller*, 69 OHIO ST. L.J. 603 (2008).

56. See Symposium, *District of Columbia v. Heller*, 13 LEWIS & CLARK L. REV.

shortly going to publish symposia about the Supreme Court's 2008 decision in *District of Columbia v. Heller*⁵⁷ that invalidated Washington's de facto prohibition of private possession of handguns even in one's own home. Though *Heller* is undoubtedly an interesting case for legal academics obsessed with "constitutional theory" and an occasional lawyer hoping, probably in vain, that *Heller* will apply beyond its very specific facts,⁵⁸ it surely does not remotely compare in importance to, say, the worries that most Americans might have about their economic futures or the particular kinds of economic catastrophes that could accompany a serious illness should they be uninsured.⁵⁹ And it is worth asking whether features of our Constitution make it more or less likely that we will, as a polity, successfully confront these latter challenges.

Let me put this in the most polemical terms possible: if law professors were in charge of teaching "icebergology," we would teach only about the ten percent of the iceberg that is visible above the water line. Our students—and perhaps we ourselves—would simply never understand why the Titanic sank. One of the reasons I have become such a zealot on this point is, perhaps, precisely because I consider myself a reformed sinner. Although I have been teaching and writing about the Constitution and American constitutional law for four decades, it is only in the past decade or so that I have become so harshly critical of the pedagogical verities that I myself happily accepted and implemented in my teaching and writing.

Perhaps I can illustrate my own personal development with regard to what I have called "a tale of two signings."⁶⁰ The title is in part a reference to the last chapter of an earlier book, *Constitutional Faith*, which concluded with the story of my visit, in 1987, to the bicentennial exhibit in Philadelphia.⁶¹ Visitors were given the opportunity, at the end of the exhibit, to signify their approval of the Framers' handiwork by "signing the Constitution" themselves, on an endless scroll of signatures. I noted my ambivalence about doing so, in part because the original Constitution, of course, had no Bill of Rights, in part because, even more ominously, it included certain compromises with slavery. Yet I decided to sign, not least because the great African-American abolitionist, Frederick Douglass, was willing to endorse the pre-Fourteenth Amendment Constitution in speeches he made in the late 1850s⁶² (after earlier being a far more radical "constitutional rejectionist" in the mold of William Lloyd Garrison,

(forthcoming Summer 2009).

57. 128 S. Ct. 2783 (2008).

58. See Sanford Levinson, *For Whom Is the Heller Decision Important and Why?* 13 LEWIS & CLARK L. REV. (forthcoming Summer 2009).

59. See, e.g., Erik Eckholm, *States Slashing Social Programs for Vulnerable*, N.Y. TIMES, Apr. 12, 2009, at A1. Though some might hope that the Constitution (and courts) might protect some of these "vulnerable" victims of state spending cuts, there is no good reason to believe that is the case. Their fate is in the hands of a political system that is rather systematically stacked against them inasmuch as the well-off have a plethora of "veto points" with which to block legislation. For anyone interested in protecting the poor, that fact is considerably more important than is even the most imaginative (and likely to be unavailing) theory of the Fourteenth Amendment. Our students should know that.

60. SANFORD LEVINSON, OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT) 3 (2006).

61. LEVINSON, *supra* note 21, at 191–93.

62. JAMES A. COLAIACO, FREDERICK DOUGLASS AND THE FOURTH OF JULY 163–66 (2006).

who described it as an agreement with Hell and a “covenant with Death”).⁶³ My feeling was that if it was good enough for Frederick Douglass, then it was good enough for me.

Yet in 2003, when I was participating in the grand opening of the National Constitution Center, also in Philadelphia, and was given a similar opportunity to conclude my visit by “signing the Constitution,” I did not do so. The reason was not that I changed my mind about the specific argument that had proved convincing in 1987. Rather, and far more importantly, I had come to the conclusion that “we”—whether law professors or ordinary citizens—tended to overestimate the importance of the ostensibly “rights protective clauses” of the Constitution and, concomitantly, underestimate grievously the significance of the basic structural provisions of the Constitution. James Madison famously concluded Federalist No. 48 by observing “that a mere demarkation on parchment of the constitutional limits of the several departments, is not a sufficient guard against those encroachments which lead to a tyrannical concentration of all the powers of government in the same hands.”⁶⁴ Such “parchment barriers” may be pleasant to read, but they are certainly vulnerable to changing interpretations. That is, indeed, the most important theme of “the narrative of change.”

So where, if at all, do we really find our “unchanging” Constitution? The answer is those clauses that most students study, if at all, in what they probably remember as boring “civics courses” well before they came to law school. How many students, for example, were subjected to a blackboard demonstration of “how a bill becomes a law”—or what I prefer to label “why it is that most bills never stand a chance in hell of becoming a law?” Perhaps the best way of distinguishing the “unchanging” Constitution from those parts that are exemplified in the “narrative of change” is precisely to ask ourselves what parts of the Constitution would lend themselves easily to true-false, multiple-choice, or easy fill-in-the-blank kinds of tests. That they may be easy to answer should not in the least be taken as evidence that they are therefore unimportant. These parts of the Constitution constitute, in important respect, the legal ocean within which we live. The fact that fish may not recognize that they spend their lives in water obviously does not lessen the importance of that realization for the rest of us (or for the fish themselves if they ever developed sufficient self-consciousness). Similarly, those parts of the Constitution we thoughtlessly take for granted and, therefore, almost never argue about, may in fact be of determinative importance to the success or failure of the constitutional enterprise. And, given our ostensible intellectual capacities, we have less excuse than do fish, including even whales or dolphins, for failing to recognize the contexts within which we live that could, with effort, be changed for the better.

So what happens if one looks at the “unchanging” Constitution, that is, the all-important parts of the Constitution that are remarkably similar in fundamental respects to what came out of Philadelphia in 1787? I want to make two arguments. First, as with the iceberg analogy, one understands things about the American system of government that one rarely gains from studying constitutional law in the standard model course. This is, like the first part of my analysis of “the narrative of change,” simply an

63. JOHN JAY CHAPMAN, WILLIAM LLOYD GARRISON 170 (1974).

64. THE FEDERALIST NO. 48, at 277 (James Madison) (E.H. Scott ed., 1898).

empirical argument.⁶⁵ We see things differently and more accurately than we did before. But, as with the second prong of my discussion of the earlier narrative, there is also a normative element.⁶⁶ Again drawing on the iceberg analogy, I strongly believe that we are, in 2009, fundamentally disserved by many aspects of the Constitution. Whether it has, like the fateful iceberg in the North Atlantic, the capacity to sink the world's greatest ocean liner, widely acclaimed for being indestructible,⁶⁷ is yet unknown, but I obviously believe we ignore that possibility at our peril.

I referred earlier to the reassurance provided by the standard “narrative of change”—or, at least, by those who praise the “dynamism” of our “living Constitution”—that our Constitution is adequate to whatever challenges have faced us in the past or might face us in the future, even if some reactionary judges had not sufficiently grasped this point. At least since the Warren Court in the 1950s, a central part of the legal academy's narrative has been the suppleness of the Constitution in the hands of a properly sensitive Supreme Court, even if it is also true that many admirers of that earlier Court are dismayed by the later, presumptively less imaginative, Justices who succeed such ostensible giants as Chief Justice Warren or Justice William J. Brennan. Even if one looks to institutions other than the Supreme Court—or to constitutional amendment itself—partisans of “the narrative of change” offer, at the end of the day, an ultimately complacent vision of the Constitution.

Though it is true that some people may find “the Constitution of stasis” to have its own satisfactions—this is the difference, after all, between description and normative evaluation—I believe that more would, if it were clearly pointed out to them, realize that “the Constitution of stasis” may be dangerously dysfunctional in our twenty-first century world. A remarkable number of Americans have basically lost faith in our political institutions. In July 2008, the Gallup Poll headlined one of its reports, “Bush, Congress, Supreme Court Near Historical Low Approval.”⁶⁸ Some of this may be applauded or explained away as “mere” partisanship. But surely, many Americans, regardless of their partisan commitments, can also be forgiven a perception that our institutions are simply not working.

The presidential election of 2008 featured, as an almost obsessive mantra, the importance of “change,” and that certainly was not confined to the campaign's ultimate winner, Barack Obama. After all, John McCain began one of his ads with the words “Washington is broken,”⁶⁹ and no candidate, to my knowledge, offered any praise of our operating political system. Or consider the fact that a recent book co-authored by political scientists Norman Ornstein of the American Enterprise Institute and Thomas

65. *See supra* Part I.

66. *See* discussion *supra* Part I.

67. Thus the power of the wonderful headline “World's Largest Metaphor Hits Ice-Berg.” OUR DUMB CENTURY: THE ONION PRESENTS 100 YEARS OF HEADLINES FROM AMERICA'S FINEST NEWS SOURCE 13 (1999).

68. *See* Jeffery M. Jones, *Bush, Congress, Supreme Court Near Historical Low Approval*, GALLUP, June 16, 2008, <http://www.gallup.com/poll/108010/Bush-Congress-Supreme-Court-Near-Historical-Low-Approval.aspx>.

69. “Washington is Broken,” Campaign Advertisement from Senator John McCain, *available at* <http://www.entertainment.com/clips/11014/Politics-News/John-McCain/Campaign-Ad/Washington-is-broken>.

Mann of the Brookings Institution referred, almost in despair, to Congress as *The Broken Branch*.⁷⁰ Where I part company from all of the candidates and pundits, though, is in my assignment to the Constitution itself of at least some of the blame for our perilous condition. It will take far more than election of one's favorite candidate or the restoration of certain civility norms, as counseled by Ornstein and Mann,⁷¹ to restore faith in the ability of the United States government, as structured by the Constitution, to allow a response adequate to the various crises that face us.

"[W]e must never forget that it is a *constitution* we are expounding," John Marshall notably wrote some 190 years ago.⁷² "[It is] a constitution, intended to endure for ages to come, and consequently, to be adapted to the various *crises* of human affairs."⁷³ The "narrative of change" allows us a certain optimism with regard to Marshall's call for timely adaptation. What is far more dispiriting, however, is the possibility that there is *not* enough play in the Constitution's "adaptive joints" to allow it (or us) to meet today's crises.

There are many examples of constitutional inflexibility that can be offered—I discuss a host of them in my book *Our Undemocratic Constitution*.⁷⁴ These include, but are not limited to:

1. bicameralism with absolute veto by each house;
2. the Senate;
3. the presidential veto;
4. the electoral college;
5. the inability to get rid of a president in whom we have lost confidence;
6. full-life tenure of Supreme Court Justices;
7. the practical impossibility of amending the Constitution because of the supermajority requirements in both houses of Congress, and then an even more onerous supermajority requirement with regard to ratification by the states.⁷⁵

Given that I have spelled out many of these arguments elsewhere, I will not rehearse them here. But I do want to offer one further example (treated in the book as well), precisely because it was such an obvious part of our political reality between November 4, 2008, and January 20, 2009. We were—and not, obviously, for the first time—faced with the consequences of the remarkable hiatus that the Constitution generates between the election and the inauguration of the winning candidate. Perhaps there are times when this is of no great significance, such as the succession of Ronald Reagan by his Vice President, George H. W. Bush. But there have been other occasions when one might believe this was most unfortunate for the country. During the roughly eleven weeks between election and inauguration, one could easily argue that the United States of America did not really possess a government adequate to meeting the challenges of what is widely agreed to be the most severe economic crisis

70. THOMAS E. MANN & NORMAN J. ORNSTEIN, *THE BROKEN BRANCH: HOW CONGRESS IS FAILING AMERICA AND HOW TO GET IT BACK ON TRACK* (2006).

71. *See id.* at 80.

72. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 406 (1819) (emphasis in original).

73. *Id.* at 414 (emphasis in original).

74. LEVINSON, *supra* note 60.

75. *See generally id.*

in at least seventy-five years. There was, to be sure, a *legal* President, George W. Bush, who, however, possessed only a modicum of political legitimacy, given the fact that even the Republican candidate, John McCain, was pledging to repudiate important features of the Bush presidency if elected. And there was a president-elect who possessed great legitimacy, but, of course, no legal authority. One must await the findings of historians and econometricians to figure out the full cost of the hiatus, but no rational person could believe that the United States benefitted from it.

“Lengthy presidential transitions rank among the oddest of America’s political traditions,” writes *Washington Post* columnist Jim Hoagland.⁷⁶ “In the 21st century, they are also among the most dangerous.”⁷⁷ Hoagland refers to “this clanking 77-day transfer of executive power” during a time of both international and domestic crises, concerning both national security—the United States is, of course, involved in two wars—and the economy, where the United States, and the world, are confronting the most serious set of economic crises since the Great Depression of the 1930s.⁷⁸ Indeed, former Secretary of State, Warren Christopher, writing in the *Los Angeles Times* just two days after the election, began his column as follows:

The work of the president-elect has begun. There is no time to savor victory, no time to ease into the job. Two hot wars and the greatest economic crisis of our time have combined to create an unprecedented sense of urgency. The oft-repeated advice to hit the ground running isn’t very helpful when that ground is roiled by violent seismic activity.⁷⁹

Mr. Christopher might also have pointed out that “advice to hit the ground running” is somewhat beside the point if the winner cannot take the field for almost thirteen weeks following the election.

More recently, University of Wisconsin historian John Milton Cooper began an op-ed column in the *New York Times*, aptly titled “The Pause That Depresses,” by calling for a “quicker transition of power in troubled times like these.”⁸⁰ Cooper, a specialist on Woodrow Wilson, noted that Wilson had apparently determined to speed up Charles Evans Hughes’s ascent to the presidency should Hughes have won the 1916 election, which Wilson narrowly won only because of a slender margin in California.⁸¹ Cooper also notes the price the country paid in 1860–61 and 1932–33 because of the long interregnum between the repudiation of the existing presidential regime and the replacement by a decidedly different successor.⁸² It was even longer then, as presidents

76. Jim Hoagland, Op-Ed., *Obama’s 77-Day Sprint*, WASH. POST, Dec. 7, 2008 at B7.

77. *Id.*

78. *Id.*

79. Warren Christopher, Op-Ed., *Warren Christopher on the Transition*, L.A. TIMES, Nov. 6, 2008, at A29.

80. John Milton Cooper, Op-Ed., *The Pause that Depresses*, N.Y. TIMES, Dec. 10, 2008, at A49.

81. Wilson’s plan apparently was to appoint Hughes as Secretary of State and then for Wilson and his Vice President, Thomas Marshall, to resign, leaving Hughes next in line under the then operative succession rules. *See id.* The Act was changed in at the end of World War II to make the Speaker of the House next in line to the Vice President. *See id.*

82. *Id.*

were not inaugurated until March fourth. That date was changed by the Twentieth Amendment,⁸³ ratified in 1933, to January twentieth, the present Inauguration Day.

Two things are worth noting: First, an earlier generation was willing to contemplate the possibility that the Constitution had its defects—in this case the March fourth Inauguration Day, as well as a newly elected Congress not necessarily meeting until thirteen months after the election—and rectify them in a constitutional amendment. That is the good news. The distinctly bad news, and my second observation, is that none of the critics of the current interregnum, for all of their justified concern, has thought fit to suggest that the Constitution is defective and that, therefore, we might emulate our predecessors and consider amending the Constitution. This is, I believe, the best example of the stranglehold that “the Constitution of stasis” has over even some of the most knowledgeable and sophisticated observers of the current political scene.

It is truly impossible to figure out why in the twenty-first century one would want to defend the January twentieth inauguration date any more than our ancestors in 1933 wished to maintain the almost 150-year-old practice of inaugurating presidents on March fourth. Both literally and metaphorically, January twentieth is far closer to March fourth than to the date in November when we hold our national elections. To be sure, one might shorten the interregnum by holding elections later than November, perhaps the first Tuesday in December. But that solution, even assuming its desirability, forces us to recognize the extent to which the Inauguration Day Clause is intertwined with another very important part of the Constitution that structures the way we choose our presidents. That, of course, is the Electoral College.

The interregnum was originally thought necessary because no one really envisioned in 1787 that the final result would be known on Election Day itself. Indeed, there was no general election day until 1845, when the first Tuesday after the first Monday in November was set as the national presidential Election Day.⁸⁴ The original assumption was that, at least after George Washington’s obvious presidency, presidential electors—and not, of course, the general public—meeting in December would attempt to choose the President and Vice President and, if unsuccessful in casting a majority of votes for a single candidate, then the House of Representatives would choose the President and the Senate the Vice President. The Twelfth Amendment was added to the Constitution in the aftermath of the fiasco of 1800, where Thomas Jefferson and Aaron Burr tied for first and Thomas Jefferson was chosen only two days before inauguration on the thirty-sixth ballot. The Twelfth Amendment maintained this basic scheme save for requiring separate choices for President and Vice President and leaving it to the Senate to select the Vice President should no one gain a majority of votes for that office.

Only once after 1800 did the Electoral College fail to select a President, necessitating a choice by the House in 1824. A shift of a very small percentage of the vote in several states might well have thrown the election into the House in both 1948 and 1968, when strong regionally-based candidacies by Strom Thurmond and George Wallace, respectively, won several dozen electoral votes and threatened to leave the

83. U.S. Const. amend. XX.

84. See Posting of Kate Kelly to America Comes Alive! Blog, <http://americacomesalive.com/blog/2008/06/why-is-election-day-on-the-tue.html> (June 13, 2008, 14:29 EST).

first-place candidates, Harry Truman and Richard Nixon, respectively, without the required electoral-vote majorities. Had the House been forced to choose, incidentally, the voting rule is one-state/one-vote, so that Vermont, Texas, Wyoming, and California are equal in voting power.

In any event, any serious discussion of significantly shortening the delay between election and inauguration would require a necessarily linked discussion of whether we are well served in the twenty-first century by the Electoral College. It is certainly not radical to suggest that the answer is a decided no. Apparently reforming the Electoral College has accounted for more proposed constitutional amendments than any other single subject.⁸⁵ An American Bar Association poll in 1987 showed that sixty-nine percent of its lawyer respondents favored abolition, as did broader public opinion polls in 1967 (fifty-eight percent), 1968 (eighty-one percent), and 1981 (seventy-five percent).⁸⁶ To be sure, there is obviously no unanimity on the issue.⁸⁷

And why does nothing happen with regard to the Electoral College (or, for that matter, Inauguration Day)? There the answer may be found in another important part of “the narrative of stasis,” which is Article V and the near-impossible conditions it places on successful achievement of formal constitutional amendment. Article V has not, obviously, prevented at least some significant change, including what Bruce Ackerman has termed functional amendment outside of Article V barriers.⁸⁸ That is one of the points, after all, of “the narrative of change.” But Ackerman and other optimistic proponents of what can be done even without formal amendment too often avert their eyes from fully comprehending the important aspects of the Constitution that are impervious to other than formal change. Only a full confrontation with “the narrative of stasis” would force such recognition, and that, as I have argued at the outset, is less likely than it should be to happen if legal academics continue to teach, whether affirmatively or negatively, only the “narrative of change.”

I do not want to be read as suggesting that there is one obviously best solution to the election-inauguration conundrum. If, as I believe, the current eleven-week hiatus is much too long, that does not necessarily lead one to support, say, the British practice by which a newly elected Prime Minister moves into 10 Downing Street literally the next day. The reason is simple: We do not operate under a parliamentary system, as the British do, which assures that there is always in place a “shadow government” ready to take over the various ministries should the government in power be displaced. Our newly-elected presidents must pick their cabinets from scratch, as it were, which has generated the peculiarly American institution of “the transition.” But we might still expect transitions to be significantly shorter than they are now.

85. See United States Electoral College, Frequently Asked Questions, <http://www.archives.gov/federal-register/electoral-college/faq.html#reforms>.

86. *Id.*

87. See, e.g., Sanford Levinson, John McGinnis & Dan Lowenstein, Debate, *Should We Dispense With the Electoral College?*, 156 U. PA. L. REV. PENNUMBRA 10, 10–37 (2007), http://www.pennumbra.com/debates/pdfs/electoral_college.pdf.

88. See *supra* note 39 and accompanying text; see also Sanford Levinson, *How Many Times Has the United States Constitution Been Amended?* (A) <26; (B) 26; (C) 27; (D) >27: *Accounting for Constitutional Change*, in *RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT*, *supra* note 39, at 13.

If Inauguration Day were only, say, a month after the election, we would expect presidential candidates to appoint their “transition committees” during the campaign itself and to be able to make key appointments immediately. We might even expect candidates faced with this new reality to tell the public who those choices might be and thus lessen the extent to which our presidential elections have overtones of choosing an elective monarch who is given an astonishingly free hand in selecting his or her cabinet (and therefore disappointing millions of voters who might have had different expectations of the candidate). The point is that we cannot seriously debate the difference between choosing, say, November twentieth or December fifteenth as the inauguration until we first decide that the current constitutional stasis is sufficiently dangerous to require thinking about constitutional reform.

CONCLUSION

In his eloquent conclusion to the Federalist No. 14, James Madison wrote that the Founders (of which, of course, he was an especially important member) had “formed the design of a great Confederacy, which it is incumbent on their successors to improve and perpetuate.” He preceded this by asking if it is “not the glory of the people of America, that, whilst they have paid a decent regard to the opinions of former times and other nations, they have not suffered a blind veneration for antiquity, for custom, or for names, to overrule the suggestions of their own good sense, the knowledge of their own situation, and the lessons of their own experience?”⁸⁹ These words echo Alexander Hamilton’s equally inspiring statement in Federalist No. 1, that “it seems to have been reserved to the people of this country, to decide by their conduct and example, to decide the important question, whether societies of men are really capable or not of establishing good government from reflection and choice”⁹⁰

The central question facing American citizens in the twenty-first century is precisely that faced so admirably by those who wrote the Constitution in 1787 and, for that matter, by those who proposed and ratified the Twentieth Amendment in 1933. Are we capable of exercising our own reflection and to make our own well-reasoned choices about how we wish to govern ourselves, or are we, on the contrary, trapped within a static constitutional structure that ill serves our country at this very moment (as it has in the past and, sadly, may well do so in the future)?⁹¹

Students whose professional education now is monopolized in effect by the “narrative of change,” with all of its implicit (and often explicit) optimism, should be compelled to think as well about the questions generated by the “narrative of stasis.” I cannot promise that they will therefore be better equipped to litigate constitutional cases. I am confident, though, that they will be far better leaders in the future, should that be their role, if they have confronted the Constitution of the United States in its entirety, and not only the most seemingly dramatic ten percent, that dominates our

89. THE FEDERALIST No. 14, at 80 (James Madison) (E.H. Scott ed., 1898).

90. THE FEDERALIST No. 1, at 11 (Alexander Hamilton) (E.H. Scott ed., 1898).

91. I wish I were more optimistic about the answer to my question. See generally Sanford Levinson, *Afterword: Do We Really Believe Any Longer in the Possibility of “Government from Reflection and Choice”?* *A Dour Meditation on Our Present Situation*, 67 MD. L. REV. 281 (2007).

present notion of what constitutes the subject matter of a course on “constitutional law.”